BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 04-227
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

As Paxson Communications Commission ("PCC") demonstrated in its Comments in this proceeding, the Commission's decision regarding full digital multicast must-carry will play a decisive role in determining whether over-the-air television broadcasting will remain a meaningful competitor in the local and national video programming distribution markets after the transition to DTV is complete. In short, if the Commission fulfills its statutory duties and orders full digital multicast must-carry within the next 6 months, it will allow for the full flowering of local television competition by creating the conditions necessary for a brand new facilities-based competitor to the cable and satellite MVPDs. Moreover, the Commission will, in a single regulatory stroke, create the opportunity for the greatest expansion of diverse, local television programming since the Commission began issuing commercial television licenses in 1941. On the other hand, if the Commission ignores the plain requirements of the 1992 Cable Act, it likely will bring about a slow decline in the relevance of broadcast television to competition in these markets.

PCC files these Reply Comments to set the record straight in response to the MVPD commenters in this proceeding who have suggested that must-carry is no longer necessary to ensure fair competition in the video programming delivery market. At this

critical time in the history of television, the Commission must support free over-the-air broadcasting as Congress has commanded by ordering full digital multicast must-carry, not abandon it as the major MVPDs suggest by questioning the basis for any form of DTV must-carry. To remain true to the Communications Act, the Commission's consideration of these issues must maximize competition and the public interest. Not only would multicast must-carry be the correct interpretation of the Cable Act, it would also fulfill these twin statutory mandates in the quickest and most efficient manner. In contrast, the suggestions of curtailed must-carry rights made by the MVPDs ignore the statute, squelch competition, and defeat the public's interest in local and diverse programming that the MVPDs mostly do not offer. While such a course might benefit the MVPDs' bottom lines, it bears no relationship to any Commission responsibility. Accordingly, the Commission must conclude from this proceeding that (1) the future competitive vitality of over-the-air broadcasting is essential to maximizing competition in the video programming delivery market and that (2) the only way to ensure that over-the-air broadcasting will remain a robust competitor to the MPVDs is to order full digital multicast must-carry at its earliest opportunity.

I. MUST-CARRY SHOULD BE FULLY IMPLEMENTED, NOT CURTAILED.

PCC has shown on numerous occasions that the 1992 Cable Act unambiguously requires the Commission to implement full digital multicast must-carry.[1] Ignoring this fact, Comcast suggests that the Commission ask Congress to revisit the issue of whether broadcasters still should be entitled to must-carry in any form.[2] Comcast's

[1] *See*, *e.g.*, Comments of Paxson Communications Corporation, MD Docket No. 04-210 at 6-9, filed, August 11, 2004.

[2] Comcast Comments at 44.

ignominious suggestion that must-carry is no longer "constitutionally defensible" is laughable in light of its failure to negotiate carriage agreements for broadcasters' digital and multicast programming while it aggressively attempts to corner the market on viewers' experience of digital television by making sure that cable networks comprise the vast majority of available digital programming. Obviously, the failure of most broadcasters to gain carriage of their DTV programming on cable systems is clear and convincing evidence that cable operators maintain the bottleneck control of local video programming markets that they held in 1992 when Congress found must-carry necessary. The Commission hardly needs to be reminded that Congress's ascertainment of the problem – cable operators' bottleneck control – and its solution – full analog must-carry rights – was upheld by the Supreme Court only 7 years ago.[3]

Comcast suggests that the Commission ask Congress to relieve it of its must-carry obligations in the interests of advancing the DTV transition.[4] It is hard to imagine a more preposterous suggestion. The DTV transition would be torpedoed if must-carry were repealed because the DTV transition cannot end until 85% of television viewers can receive all of their local over-the-air DTV signals.[5] As the Commission itself has recognized, achievement of that goal will take considerable participation on the part of cable operators.[6] In a world where cable operators sought to foster competition and consumer choice rather than to eliminate competition and unilaterally enact sky-high

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[3] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

[4] Comcast Comments at 43-44.

[5] 47 U.S.C. § 309(j)(14).

[6] Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, 13 FCC Rcd 15092 (1998).

rate increases, that participation could come in the form of voluntary agreements to carry digital and multicast programming. But as the Commission has seen for the past 6 years, cable operators have rejected this approach in favor of an anticompetitive strategy that seeks to starve broadcasters' ability to compete by denying them DTV carriage in an effort to draw out the resource-draining DTV transition as long as possible. Meanwhile, broadcasters continue to operate two television stations even though viewers can only view one of them and DTV penetration continues to be all but nonexistent. The elimination of must-carry will solve none of these problems and will ensure that the DTV transition is never completed.

To the contrary, if the Commission is serious about completing the DTV transition in this decade – or the next decade, for that matter – its only choice is the command that Congress has given it – FULLY IMPLEMENT MUST-CARRY! Achievement of 85% DTV penetration will require the undiluted must-carry that Congress ordered: must-carry of every local television signal, analog or digital. The statute does not discriminate and neither should the Commission. Thus far the Commission has far overreached by misconstruing its narrow authority to make technical changes in the must-carry rules to ensure full carriage of digital signals as a mandate to deny broadcasters carriage of their DTV signals. The change that is in order is not a change from Congress, but a change in this fundamental Commission misperception of the must-carry statute. **The Commission must recognize that the 1992 Cable Act requires full digital multicast must-carry, and it must order it without further delay.** Only then will the Commission begin to create the conditions necessary to ensure 85% DTV penetration and the end of the DTV transition.

As the Commission knows, jumpstarting the DTV transition is only one of the many tremendous competitive benefits that full digital multicast must-carry will bring to consumers in local video programming markets across the country. As PCC noted in its Comments, full digital multicast must-carry will make local broadcasters more effective competitors in local television markets by (1) making it economically feasible for broadcasters to offer multiple program streams and to thereby tap revenue streams for multiple channels, just as cable operators and satellite providers do; (2) giving broadcasters the airtime and revenue necessary to provide viewers with better local and national programming; (3) allowing broadcasting to regain its position as a legitimate facilities-based competitor to cable and satellite, exerting a substantial downward pressure on cable and DBS rates; (4) promoting the introduction of a greater number of high-quality, diverse, local programming choices – and, putting pressure on cable operators to do the same in more of their markets; (5) ensuring additional outlets for local and national programming aimed at currently underserved markets, including those for foreign language, faith-based, and local, community-oriented programming; and (6) providing broadcasters the opportunity to raise the moral standards and the level of political discourse by giving them the ability to air programming that is designed to do more than simply keep up with the increasingly indecent programming available on cable and satellite. **The Commission can achieve all these benefits simply by following the law, or it can ignore the law and all the public benefits that following the law would create by accepting Comcast's invitation to ask Congress to eliminate the portions of the must-carry statute with which the Commission**

currently is requiring compliance. <u>The choice should be clear, and Comcast should be ashamed of itself</u>.

II. MUST-CARRY MEANS MULTICAST MUST-CARRY FOR BOTH CABLE AND SATELLITE PROVIDERS.

Like Comcast, SBCA asks the Commission to ignore the law by relieving satellite television providers of their obligation to carry all local DTV signals in any market where they carry any one of those signals.[7] Just like the cable must-carry statute, the Satellite Home Viewer Improvement Act is absolutely clear regarding satellite operators' obligations, and they include full digital multicast must-carry. Nonetheless, SBCA takes a page out of the cable operators' playbook by claiming that requiring carriage of broadcasters' high definition and/or multicast signals will lead to widespread local service disruptions due to limited satellite bandwidth. Of course, SHVIA says nothing about limiting satellite providers' obligations based on technical bandwidth constraints, but having watched the Commission fret cable operators' threats of dropped services in the cable DTV must-carry proceeding, SBCA knows just what note to hit. So long as the Commission can be so easily spooked into ignoring the law, it can expect these types of arguments.

PCC has a different suggestion: Follow the law, and let the market dictate in which markets satellite operators carry local stations. SHVIA's "carry one-carry all" requirement applies on its face to HDTV and multicast program streams because that programming is part and parcel of the local signals to which the Act refers. Accordingly, the Commission should conform satellite providers' and cable operators' full digital multicast must-carry obligations to comport with Congress's obvious intent.

That is the law. As for the market, satellite operators don't carry local stations out of the goodness of their heart; they carry them to better compete with cable operators, and they will continue to carry those stations if they expect to continue grabbing subscribers from cable. In point of fact, SHVIA has been a huge competitive boon for satellite providers, and there is no reason why they shouldn't have to fulfill their congressionally-mandates duties in exchange for the benefits they are receiving from the ability to carry local broadcast signals. As SBCA concedes, compression and spot-beam technology continue to improve, and there is no reason to suspect that trend to stop. Moreover, the Commission has ample evidence that satellite providers already have sufficient spectrum to carry broadcasters' full digital signals – HDTV or multicast. To top it all off, as PCC has pointed out, satellite providers continue to acquire new spectrum that will only make it easier for them to provide full digital HDTV or multicast signals as time passes. So long as the market continues to demand local signals and technology continues to make full digital carriage easier, there is no policy reason to even tempt the Commission to ignore the law and refrain from requiring full digital carriage under SHVIA.

Indeed, there are serious competitive reasons to resist SBCA's entreaties. Like the cable operators, SBCA trumpets its "leadership" in introducing HDTV services to their viewers through the carriage of non-broadcast networks.[8] In the next breath it says that it can't possibly carry broadcasters' HDTV or multicast programming. It's hard to imagine a more anti-competitive sentiment. Essentially, what SBCA is saying is that

[7] SBCA Comments at 15-16; *see also* 47 U.S.C. § 338.
[8] SBCA Comments at 15.

when their subscribers think about advanced television, they want them thinking "anything but broadcast." If satellite broadcasters want to play this anticompetitive game – and it's the same game cable operators have been playing for years – they should have to pay the price and, under existing law, that price is that they don't get to carry local broadcast signals. If the Commission would force the choice that the statute requires satellite broadcasters to make, it can be 100% certain that they will find a way to make full carriage of local broadcast signals work.

But if the Commission continues to wring its hands, it can be equally certain that satellite providers will continue to aggressively push non-broadcast advanced services while continuing to refuse to carry the same services offered by broadcasters. In this environment, so far from what Congress intended, there is no way that broadcasters can compete effectively with satellite or cable. Now that cable operators and satellite providers have indicated that they will no longer be competing on the basis of price, Commission inaction guarantees that consumers will continue to see spiraling rates for both cable and satellite programming. **A viable free competitor would bring significant price discipline to these services, but such competition will not materialize without full digital multicast must-carry for both satellite providers and cable operators. Congress has already mandated this result. It is now up to the Commission to show a strength equal to Congress's wisdom; to cut through the MVPDs' smokescreens and to order full digital multicast must-carry without further delay**.

CONCLUSION

In this proceeding, the Commission must recognize that the maintenance of vigorous competition in the video delivery market requires a rejection of MVPD attacks

on the acts of Congress and the immediate implementation of full digital multicast must-carry. What competition exists between cable operators and satellite providers will not yield increased or improved service to local communities and accepting Comcast's and SBCA's invitations to ignore existing law will only lead to a further erosion in the competitive position of over-the-air broadcast television as a viable alternative to the MVPDs. Full implementation of Congress's must-carry mandates will bring a tidal wave of new competition to the video programming delivery market along with a remarkable set of new services and benefits to television viewers across America. **The Commission's choice is clear: follow the law and let the benefits flow.**

PAXSON COMMUNICATIONS CORPORATION

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